No. 311

FILE COPY

IN THE

Supreme Court of the United States

NO. . . OCTOBER TERM, 1960

UNITED STATES STEEL CORPORATION (American Bridge Division) and LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Steel Corporation (American Bridge Division) and Local Union 542, International Union of Operating Engineers, AFL-CIO, petitioners, respectfully pray that in the event the Court grants the National Labor Relations Board's petition for certiorari filed in this case at No. 228, October Term, 1960, then a cross writ of certiorari shall also be issued to review that part of the decree of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 17, 1960, by which that Court directed enforcement of the Board's order, as modified.

OPINIONS BELOW

The National Labor Relations Board's decision and order (R. 223a-241a),[1] including the partial dissenting opinion of Member Bean (R. 241a-243a), is reported at 122 NLRB 1324.

The opinion of the United States Court of Appeals for the Third Circuit, filed April 13, 1960, enforcing the Board's order but deleting the "Brown-Olds" reimbursement order, and including the separate opinion of Chief Judge Biggs concurring in part and dissenting in part, has not yet been officially reported but is printed at page 22 *et seq.* of the Appendix.

The supplemental opinion of the said Court, filed May 17, 1960, has not been officially reported but is printed at page 37 of the Appendix.

JURISDICTION

The decree of the Court of Appeals was entered on May 17, 1960 (Appendix pp. 39 48 *post*). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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1. "R" references are to the joint appendix filed in the Court below, nine copies of which were filed heretofore with the Supreme Court by the Board as permitted by Rule 21(4).

QUESTIONS PRESENTED

1. May the Board properly make a finding of a preferential hiring arrangement based wholly on its conclusion that a supervisor, who is also a union member, will necessarily be guided by a union rule allegedly requiring each member to hire none but members in good standing with the union having jurisdiction over any particular kind of work, rather than by instructions from his employer or the requirements of the law?

2. Where there is no substantial evidence on the record considered as a whole that preferential hiring took place, may the Board by conjecture and surmise make a finding to such effect and order the company and union to desist therefrom?

3. Where the charging party, an employee and a union member, was offered a job but of his own volition declined it because he did not want to replace another worker, and it was agreed that he would be offered the next job available, may the company and the union be ordered by the Board to reimburse the employee for the period in which he voluntarily abstained from employment?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the following provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted

to rescind the authority of such labor organization to make such an agreement: * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

"Sec. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *"

STATEMENT OF THE CASE

A. The Alleged Illegal Hiring Arrangement

American Bridge Division of United States Steel Corporation is engaged in the fabrication of structural steel for use in erecting buildings, bridges, barges and certain other specialties. A construction project at United States Steel's Morrisville, Pennsylvania, plant was involved in this proceeding (R. 10a; 18a; 211a).

On the Morrisville job the company had no written contract or arrangement of any sort with Local Union 542, but the company as a matter of policy followed the wage rates, holidays and welfare payments established in the operating area between Local 542 and various contractor associations (R. 212a; 123a-128a).

One of the provisions of the area-wide contract made by the union with certain other employers provided that every employer should employ a master mechanic whenever seven or more engineers were to be employed on any one project (R. 157a). On the Morrisville job the American Bridge Division employed such a master mechanic.

The hiring of operating engineers on the Morrisville job was commonly performed for the employer by the master mechanic. The master mechanic hired new men only when so instructed and authorized by the company superintendent. The master mechanic was given this authority because he knew the competent men in his area. The superintendent, however, hired the two employees who figured in this case, Driscoll and Russell, whom the superintendent knew personally from associations with them on former jobs (R. 213a; 95a).

Based on the above hiring authority of the master mechanic and the fact that he secured employees from the hiring hall maintained by Local 542, and also on an unwarranted and inaccurate inference that the master mechanic, both a supervisor and a union member, was obligated by the International constitution and inoperative local bylaws to hire only union members in good standing, the Board and Court concluded that the company and union were guilty of an illegal hiring arrangement.

Biggs, C.J., dissented, pointing out the record was devoid of evidence which showed that such preferential hiring did take place and that the Board and Court had substituted a plausible assumption for proof[2] (Appendix p. 36).

B. **The Alleged Discrimination Against Russell**

The charging party, Russell, a union member, was the only applicant for employment against whom any discrimination was claimed. Russell had previously applied for a job and on January 8, 1957, he came to the assistant superintendent's office on the job site to find out why he was not called for work on that day. It appeared that before Russell had arrived some mixup had occurred and that another man, Ungaro, had been put on the job.[3] The assistant superintendent, the

2. The Trial Examiner likewise found the record barren of any evidence of such arrangement (R. 212a).

3. The Trial Examiner found there was not the slightest evidence in the record to support a finding that the "mixup" was brought about either by pressure from the union or by discriminatory motive by the employer (R. 216a). Russell also testified he had called the assistant supervisor of the union that day and had been informed that he would be put to work (R. 36a).

master mechanic, the business agent of the union and Russell discussed the problem. The business agent advised the employer's representatives that they should hire Russell, although the other man, Ungaro, if displaced, might have a labor case. According to Russell, he and he alone decided on this occasion that he would not take Ungaro's job, because he did not want to knock another worker off the job.[4] It was agreed after he made this decision that he would be given the next rig that came in (R. 216a; 67a; 38a).

The next hiring occurred on January 15th, and was a last-minute affair involving the running of a "Cherry Picker" (a small caterpillar machine with a boom) around the clock. This was not the type of job the parties had in mind when Russell was promised the next rig. Russell admitted this, stating that he filed a charge with the Board because he did not get the next job on a crane, a job which was given to a man named Driscoll (R. 118a; 44a).

Driscoll was the next man hired after the "Cherry Picker" job had been assigned. This occurred on January 21st, when Driscoll, who had been promised a job prior to Russell, was assigned to work on a 3500 crane, which was the next crane or rig placed in operation on the Morrisville project. The Board specifically found that Russell was not discriminatorily denied this job given to Driscoll (R. 230a).

The final hiring incident, and that relied upon by the Board, occurred on February 14th when

4. Russell, the general counsel witness, admitted on cross-examination that if he had wanted to, he could have started to work on that day, January 8 (R. 216a; 67a).

one Joseph Monty was hired. Although he was called and recalled by the General Counsel, it was not shown that the master mechanic had not attempted to call Russell on this occasion before he hired Monty. It was shown, on the contrary, that the superintendent did call Russell on or about February 14th to take a crane job which was available on that date, but that Russell had stated that he would be tied up in a court case (R. 109). Russell testified that the superintendent called him "around the 10th maybe the 15th of February" and offered him a job on a 3900 crane coming in on the job about March 1 (R. 143a). Russell testified also that on the following evening, the business agent called him and had told him that the company would not need the "3900" because "steel got backlogged", but that there would be another job open at Morrisville on the next day. Russell then informed the business agent that he could not take this position, because he had to appear in court (R. 144a; 218a).

The superintendent again contacted Russell near the end of February, to inquire whether he would take a job on a Chicago boom that was coming in. Russell said that he would, and started to work on this assignment on March 26, 1957 (R. 42a; 218a).

The Trial Examiner was unable to find anything to support the allegations of the complaints that Russell had been refused hire at any material time by the respondent company, or that the union at any material time had attempted to cause such refusal[5] (R. 218a-219a).

5. The Trial Examiner did not accord full credence to Russell's testimony as he had in a prior proceeding because of Russell's evasive and unconvincing explanation of his inconsistent declaration in his original charge filed against the employer in this case (R. 214a; 215a).

As noted above, the complaints alleged two violations of the National Labor Relations Act: first, that Russell had been discriminatorily denied employment by the respondent company at the instance of the respondent union; and, secondly, that the respondent company and the respondent union had been parties to an illegal closed-shop hiring arrangement.

The Trial Examiner was unable to find in the record sufficient evidence to support either of these two allegations. He recommended that the complaints against both respondents be dismissed. On review by the Board, however, it rejected the Trial Examiner's recommendations; found as a fact that the company and the union had discriminated against Russell by refusing him work between January 8 and March 26, 1957; and concluded also that the company and the Union had been parties to the alleged illegal closed-shop hiring arrangement. On this basis, the Board found that the company had violated Section 8(a)(1) and (3) of the Act and that the union had violated Sections 8(b)(1)(A) and (2) of the Act, and ordered that Russell be reimbursed for his alleged loss of wages from January 8 to March 26, 1957; that the alleged illegal hiring arrangement be discontinued; and that the company and the union, jointly and severally, reimburse all present and former employees of the company who had been required to pay initiation fees, dues or other money to the union under the alleged illegal hiring arrangement (R 223a-235a). Board member Bean dissented from the Board's finding that Russell had been the victim of any discrimination under the Act (R 241a-243a).

Motions for modification and reconsideration of the Board's order were filed by both the company and the

union. These motions requested, *inter alia,* that the Board should clarify its order by limiting the reimbursement remedy to such employees as might be found by the Board to have been in fact coerced in their payments of initiation fees and dues; or, in the alternative to reopen the proceedings to receive evidence as to the employees who voluntarily paid dues and initiation fees to the union during the period in question (R. 248a; 256a). The Board issued an order denying these motions (R. 258a-259a).

Subsequently, on the Board's petition for enforcement of its order, the Court of Appeals affirmed the order, modifying it, however, by deleting the "Brown-Olds" reimbursement provision—a provision which had appeared in the case for the first time in the Board's final order. Biggs, C.J., concurred in part and dissented in part, pointing out that the record was devoid of evidence showing that any illegal preferential hiring had taken place (Appendix pp. 22-36).

REASONS FOR GRANTING THE CROSS-WRIT

The decree of the United States Court of Appeals for the Third Circuit, enforcing as modified the Board's order against the cross-petitioners, is in conflict with the decisions of another Circuit Court of Appeals; is not supported by substantial evidence on the record considered as a whole; and raises a number of questions in regard to the administration of the National Labor Relations Act, which have not been but should be reviewed by this Court, particularly if the Court shall determine to review the other points raised in the Board's petition.

1. The Decision of the Court of Appeals Conflicts with the Decisions of Another Court of Appeals on the Same Subject Matter.

The Board's order was based upon an unwarranted conclusion by the Board that, simply because a foreman belongs to a union, he will be guided by a rule of the union, allegedly requiring each member to "hire none but those in good standing with a Union having jurisdiction over the work to be done," rather than by his duty to his employer, his instructions from his employer, or by the requirements of the law.

This holding is in direct conflict with the decisions of the United States Circuit Court of Appeals for the District of Columbia. *Honolulu Star-Bulletin, Ltd. v. N.L.R.B.*, 274 F.2d 567 (D.C. Cir., 1959); *Carpenters District Council of Milwaukee v. N.L.R.B.*, 274 F.2d 564

(D.C. Cir., 1959); *Int. Union of Op. Eng., Local 150 v. N.L.R.B.*, 273 F.2d 833 (D.C. Cir., 1959).

In *Honolulu Star-Bulletin*, a case involving an alleged violation of Section 8(a) (3) of the Act, (29 U.S.C. §158 (a) (3)) one of the Board's contentions in support of its view was that since the foreman was a union man it must be assumed that he would be guided in his hiring by the rules of the union rather than by the contract between his employer and the union. The Court, Prettyman, C.J., pointed out that a similar argument had been made to the Court in the *Carpenters District Council* case, *supra*, and had been rejected. The Board's order was set aside.

It should be noted that the Board's unwarranted conclusion is inconsistent with Section 14(a) of the Act (29 U.S.C. §164a), as amended, which provides in part: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization", and also with Section 2(3) of the Act (29 U.S.C. §152(3)) which evidences the intent to make the obligations of a supervisor to the employer paramount.

Since all labor unions encourage union membership in their own and all other trades, often by provisions in their constitutions, the Board's assumption here would make it impossible for any company to permit any union member to exercise any effective authority over any group of subordinates. Any decision of any such supervisor affecting more than one subordinate could be found, by inference from the supervisor's union membership, to be a wrongful discrimination; and the

Act, as so interpreted, would make it generally impossible to give any real supervisory authority to one union member over other union and non-union employees.

2. The Finding of Preferential Hiring Is Based Entirely on Unsupported Conjecture and Inference by the Board and Is Not Supported by Substantial Evidence, on the Record Considered as a Whole.

The Board's inference of preferential hiring is premised on (1) the hiring authority of the master mechanic, (2) the facts that the master mechanic was a union member and that he secured employees from the hiring hall maintained by Local 542, and (3) an unwarranted and inaccurate inference that the master mechanic, a supervisor and union member, was obligated by the International Constitution and the inoperative local union bylaws to hire only members in good standing. None of these things can have the significance given it by the Board.

In regard to (1), it is true that the hiring of operating engineers was performed for the employer by the master mechanic, who was not only a supervisor but also a union member. The master mechanic, however, hired new men only when so authorized by the company superintendent, and he was given this authority for the valid reason that he knew the competent engineers in the area. Moreover, the superintendent, who was not a union member, hired the two employees who figured in this case, Driscoll and Russell, whom the superintendent knew personally from associations with them on former jobs (R. 213a; 95a).

In regard to (2), the fact that the master mechanic utilized the hiring hall to obtain employees, it should be pointed out that there is no evidence and no finding in the record that this practice resulted in any discrimination against any non-union applicant. Hiring through a union on a non-exclusive basis is not unlawful. *Maxon Construction Company,* 112 NLRB 444 (1955); *M. W. Kellogg Company,* 94 NLRB 526 (1951); *Missouri Boiler and Sheet Iron Works,* 93 NLRB 319 (1951); *N.L.R.B. v. F. H. McGraw & Co.,* 206 F.2d 635 (6th Cir., 1953); *Int. Union of Op. Eng., Local 150 v. N.L.R.B., supra.*

In regard to (3), the local union bylaws were admitted into evidence at the hearing for a strictly limited purpose only, viz: that they were approved by the local membership and *would go into effect when and if* the local union became autonomous, *which it did not* during any relevant period involved in this case (R. 141a; 135a-140a). These inchoate rules could not justify any inference that anybody violated the law.

In the same connection the International Union's Constitution had been received into evidence generally; but the excerpt cited and relied upon by the Board as imposing a duty on the master mechanic to hire only members in good standing, cannot in its context be made to serve any such purpose.

This excerpt appears in Article XXIII of the Constitution and is captioned "Government of Local Unions". The entire text of the Article is reproduced at pages 165a-190a of the Record. Section (a) of Subdivision 3 of Article XXIII reads as follows:

"Members of Local Unions shall conform to and abide by the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them. Each member shall keep the Recording-Corresponding Secretary properly and promptly notified of his residence and any change thereof. *Each member shall hire none but those in good standing with a Union having jurisdiction over the work to be done* nor purchase commodities without the union label thereon when otherwise possible. Members may upon proper credentials being produced obtain admission to meetings of other Local Unions of the organization" (R. 173a).

The emphasized portion constitutes the excerpt which the Board cites out of context, as obligating the master mechanic to hire only members in good standing of the Operating Engineers Union. And this, in turn, is the basis for the Board's inference that the Respondents were parties to an unlawful hiring arrangement.

Section (a) when read in its full context clearly establishes that the emphasized portion relating to the hiring of union labor is not intended to govern members of local unions in the choice of personnel for their employers. On the contrary, this requirement is addressed to *all* members who are in a position to hire *anybody* for *any* purpose; should any of them, for example, desire to hire a painter, plumber or other craftsman for work on his home. It is not intended to control the duties of union members to their own employers, much less to direct an unlawful course of conduct.

It should be noted also that the clause in question does not state that members shall hire persons in good standing with *the* union, but rather with *a* union, i.e., any union with jurisdiction over the particular work to be done, not merely the International Union of Operating Engineers. Otherwise why was the phrase "having jurisdiction over the work to be done" used to modify "a union"? If a restrictive hiring interpretation had been intended, the framers of the section could easily have worded the change "Each member shall hire none but members in good standing with *this* Union."

It is obvious, furthermore, that the sentence pertaining to hiring includes the related proviso that members shall not purchase commodities without the union label thereon. Thus, the purpose of the clause is clear; it is to promote solidarity within organized labor, and not to bind a member in the comparatively rare situation of his service as a master mechanic, with the responsibility for procuring personnel competent to perform in the jobs made available by his employer within the craft of the operating engineer.

Therefore, it is submitted that the Trial Examiner was right: that mere facts (1) that a supervisor, a union member, may hire on the instructions of the company superintendent, (2) that he utilized a hiring hall as a source to secure competent employees, where no discrimination is shown or proven against non-union applicants, and (3) that non-operative local bylaws and a general provision of the International Constitution, taken out of context and not binding on an employer or his representative, considered singly or together, are not facts which may be used to support a conjecture or in-

ference of illegal hiring, where there is no other substantial evidence in the record to support such a finding.

3. There Is No Substantial Evidence in the Record Considered as a Whole to Support the Reimbursement Provision Relating to Russell.

The record, including the testimony of Russell, the charging party, demonstrates that Russell was offered and that he declined employment on January 8, 1957, because he did not want to replace another worker (R. 216a; 67a; 38a). It was agreed, after this decision had been made that Russell would be offered work on the next rig that became available (R. 216a; 67a; 38a). The next rig that came in was actually given to Driscoll; but he had been promised a job before Russell had, and as a result the assignment was, as the Board found, not discriminatory (R. 230a).

The next hiring took place on February 14, 1957 when Joseph Monty was hired. Russell was called for work around this time and if the respondent's witnesses, instead of Russell, are credited (as it seems they were by the Trial Examiner), Russell stated he was unavailable for work at that time on account of a court case he was involved in (R. 144a).

The superintendent again called Russell near the end of February, to inquire whether he would take a job on a crane that was coming in, and Russell stated he would and commenced work on this job on March 26, 1957 (R. 42a; 218a).

Thus, there was no substantial evidence on the record considered as a whole to support any finding of dis-

crimination against Russell from January 8 to March 26, 1957. The Trial Examiner was unable to accord full credence to Russell's testimony in this case, even though he had done so in a prior proceeding, because of Russell's evasive and unconvincing explanation of his declaration in the original charge against the employer, nor did he find Russell's testimony persuasive that he was discriminated against in this case (R. 214a-215a).

The Trial Examiner, of course, was in the best position to observe the demeanor of the witnesses and to judge their credibility, and his report is to be considered and weighed by the Court along with the other substantial evidence in the record. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951), 95 L. ed. 456.

Further, as this Court succinctly said in *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), 93 L. ed. 1602, ". . . in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next."

In any event, the employer and the union should not be required to reimburse Russell for loss of pay during the period from January 6 to February 14, 1957, because Russell of his own volition refrained from employment during this period.

The Board cannot order reinstatement of an employee who refuses the employer's offer of suitable work, or who does not desire reinstatement, nor can it make any reimbursement order covering the period subsequent to such an offer: *Baxter Bros.*, 91 NLRB 1480

(1950); *Happ Bros. Co.*, 90 NLRB 1513 (1950); and see *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941), 85 L. ed. 1271.

Conclusion

The Court of Appeals properly refused to enforce the "Brown-Olds" reimbursement provision sought by the Board. The facts in the cases cited by the Board in its petition, in which certiorari has been sought or granted, are inapposite to those in this proceeding.

The validity of a reimbursement order depends upon the peculiar circumstances of the particular case. *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403, 409 (2nd Cir., 1958); and *N.L.R.B. v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 170-171 (7th Cir., 1954).

Furthermore, since the powers conferred on the Court of Appeals by the Act are equitable in nature, they should be invoked only if the relief sought is consistent with the principles of equity and will effectuate the policies of the Act. The remedy sought by the Board must be essentially remedial and not penal. *Republic Steel Corp. v. Labor Board*, 311 U.S. 7 (1940), 85 L. ed. 7.

The Court of Appeals, under the facts and circumstances of this case, properly refused to enforce the "Brown-Olds" provision of the Board's order and it is submitted that the Board's petition for certiorari should be denied.

But in the event that this Court does grant the Board's petition for certiorari, then it is respectfully

submitted that for the reasons heretofore stated, this cross-petition should be granted also.

Respectfully submitted,

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Dated August 9, 1960

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,011

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, *AFL-CIO*, Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1960

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed April 13, 1960)

By GOODRICH, *Circuit Judge*.

The National Labor Relations Board in this case petitions for enforcement of an order made by it against both the employer United States Steel Corporation (American Bridge Division) and Local Union 542, International Union of Operating Engineers, AFL-CIO. There is no doubt about jurisdiction of the Board and the Court. The Board has found that the employer violated Sections 8(a) (1) and (3) of the National Labor Relations Act[1] and that the union violated Section 8(b) (1)

1. 29 U.S.C.A. § 158(a) (1) and (3).

(A) and (2) of the Act.[2] The complaint here was started by an employee named Russell who claimed to have been discriminated against in hiring procedures.

The facts are fully stated in the opinion of the Board, 122 N.L.R.B. No. 155. We will summarize them very briefly here. There is no formal contract between American Bridge Division of the United States Steel Corporation and Local 542. But it was shown that the provisions of the area-wide contract between Local 542 and various contractor associations in the area have been followed with regard to American Bridge's operations at U.S. Steel's Morrisville, Pennsylvania, plant.

One of the provisions of the area-wide contract requires the employer to employ a Master Mechanic whenever seven or more engineers are utilized on any one project. Hiring of operating engineers at the Morrisville plant was performed by the Master Mechanic (a union man) who is a "supervisor" within the meaning of Section 2(11) of the Act.[3] There is sufficient evidence in the record to support the Board's findings that (1) the Master Mechanic (except for two instances) exercised complete control over the selection of operating engineers to be employed, (2) the Master Mechanic secured employees exclusively from the hiring hall maintained by Local 542, and (3) the Master Mechanic was required by the constitution of the International Union and by the by-laws approved by the members of Local 542[4] to hire only those in good standing with the

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2. 29 U.S.C A. § 158(b) (1) (A) and (2).

3. 29 U.S.C.A. § 152(11).

4. The union contends that the proposed by-laws of Local 542 were never technically put into effect since

union. Added to these findings is the fact that neither the employer nor the union suggested before the Board that any non-union men were employed by American Bridge at the Morrisville plant.

We think the Board was justified in concluding that, as a result of the Master Mechanic's dual capacity as agent for both American Bridge and Local 542, both employer and union were responsible for the hiring procedures employed. It was also justified in concluding that there existed a hiring arrangement which limited employment to union members in good standing with the union. Such a hiring arrangement has often been held to be a violation of the Act.[5]

As for Russell himself, the evidence shows that, on three occasions, he was denied employment for which he was qualified. Russell was a member of Local 542 who had been involved in disputes with officials of the Local over the manner in which they conducted union affairs. He contended, and the Board so found, that the union opposed his employment because of these disputes and that he was denied employment on the specific oc-

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Local 542 had no officers but was under the direct supervision of the International. Even if we accept that contention, it does not follow that the by-laws are immaterial. A majority of the members of Local 542 approved the by-laws and, in light of the facts shown, the Board was entitled to conclude that the Master Mechanic and other members of Local 542 followed them whether or not the International recognized them as being in effect.

5. See NLRB v. Philadelphia Iron Works, 211 F. 2d 937, 943 (3d Cir. 1954), and cases cited therein. See also NLRB v. Local 420, Plumbers, 239 F. 2d 327, 330 (3d Cir. 1956).

casions as a result of the operation of the unlawful hiring arrangement.

The trial examiner who heard the testimony recommended dismissal of the entire complaint for lack of evidence. But the majority of the Board, one member dissenting, reversed the trial examiner and held the testimony sufficient to uphold the charges made by Russell.[6] Although the evidence to support the Board's findings is not very strong, we think the case is not so weak that we can deny enforcement of the Board's order for lack of evidence.

The order for the most part was in the usual form. It directed reimbursement to Russell for any loss of pay he may have suffered during the short period in which it was found that he was discriminated against, and directed the union to withdraw its objections to his employment. It required the posting of the usual notices. While the cease and desist provisions forbidding discrimination went beyond the Morrisville plant of the respondent company, we do not think that there is adequate ground for complaint on this item.

This brings us to the controversy presented by the final section of the Board's order. The Board applied what is known as the *Brown-Olds* formula for relief.[7]

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6. Member Bean dissented only on the question of discrimination in denying employment to Russell. He agreed with the majority that the respondents violated the Act by maintaining the unlawful hiring arrangement.

7. The remedy derives its name from the case of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry, etc. and J. S. Brown-E. F.

It said that the hiring arrangement had the result of "inevitably coercing employees not only to become members in good standing in the Respondent Union, but also to pay the Respondent Union initiation fees, dues and other sums. The payment of such moneys," continued the Board, "thus constituted the price employees had to pay for their jobs in disregard of their statutory rights."

Following this line of thought, the order provided that the respondent employer and the respondent union:

> shall jointly and severally reimburse all present and former employees of Respondent Company, who have unlawfully been required to pay initiation fees, dues, or other money, to the Respondent Union in order to secure or retain employment with the Respondent Company under the illegal hiring arrangement between the Respondents during the period beginning 6 months before the filing and service upon the Respondents of the charges in this proceeding, in the manner set forth in the section of this Decision entitled "The Remedy."

One of the subsidiary attacks which the union makes on this order is that the Board refused to reopen

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Olds Plumbing and Heating Corp., 115 N.L.R.B. 594 (1956).

There are presently before this Court four other cases involving *Brown-Olds* remedies: NLRB v. American Dredging Co., No. 12,918 *(sur petition for rehearing)*; NLRB v. Local 1566, ILA, No. 12,903, (argued Nov. 16, 1959); NLRB v. Lakeland Bus Lines, Inc. and Lakeland Bus Operators Ass'n, No. 13,016, (argued Feb. 5, 1960); Paul M. O'Neill Int'l Detective Agency v. NLRB, No. 12,992 (argued Mar. 7, 1960).

the case and permit the union to offer testimony from employees that they were not coerced. Counsel for the Board, in argument here, says the reason for that refusal was that the evidence would be irrelevant. The union says that this shows that the Board's premise is that "no working man would join a labor union and pay dues to it unless he was compelled to do so by a closed shop agreement or practice." Counsel for the Board conceded that the presumption of coercion is a conclusive one once the unfair labor practice is shown.

We think it is helpful in the discussion of the question here to set aside one situation where it has been held that a broad dues-reimbursement order is proper. Where the unfair labor practice consists of employer-domination in the creation of a union, the imposition of such reimbursement has been approved by the Supreme Court. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). In such a situation reimbursement is proper because the union is an illegitimate union from the beginning. Its existence is illegal. The dues themselves are the fruits of the unfair labor practice for, in the absence of the unlawful practice, there would have been no union; a fortiori, there would have been no dues paid to it. Reimbursement is simply a way of pulling the unlawful organization up by the roots. An analogous situation is the annulment of a marriage.

In a recent case,[8] the Court of Appeals for the Ninth Circuit drew a clear distinction between the situ-

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8. Morrison-Knudsen Co. v. NLRB and International Hod Carriers v. NLRB, — F. 2d —, Nos. 16,383, 16,401 (9th Cir. Feb. 19, 1960).

ation of five young athletes who were forced to join a union and pay dues as a condition of employment and the remainder of the employees concerning whom there was no evidence of coercion. The Court permitted reimbursement of dues to the five who had been coerced; it denied it to the others.[9] In this case the court also enforced the reimbursement provision against the employer. We are not committing ourselves on this point. *Cf. Morrison-Knudsen Co. v. NLRB*, — F. 2d —, No. 25,613 (2d Cir. Mar. 2, 1960).

In the case before us there was no evidence that any employee was coerced. Even Russell, around whom all the controversy centered, was not coerced into joining the union. Rather he was dissatisfied with the way the union was being run.

In this case, too, the suggestion of the *Brown-Olds* remedy was not made in the complaint. It was not advised by the trial examiner; he, having recommended dismissal of the complaint, never reached the question of the remedy. It was not noted in General Counsel's exceptions to the trial examiner's report nor presented by the General Counsel to the Board. In other words, the imposition of the reimbursement order was the Board's own idea.

In passing on the validity of any order of the Board requiring affirmative action, we must always bear in mind two basic propositions: (1) The Board can only

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9. We have already recognized that ordering a union to refund dues to those members who were actually coerced into joining or remaining in the union is an appropriate remedy. See NLRB v. Local 420, Plumbers, 239 F. 2d 327, 331 (3d Cir. 1956).

order such affirmative relief as will "effectuate the policies" of the Act;[10] (2) This power of the Board is remedial.

But to order a union to reimburse dues which it would have collected even if it had not committed an unfair labor practice appears to be nothing more than a fine which, in this instance, is paid into private, rather than public, coffers.

Argument for the Board urges that the imposition of this reimbursement remedy will serve as a deterrent against unfair labor practices by both employer and union. That well may be; when one looks at the constitution of the union and sees what it costs to join it, reimbursement of dues and fees could well be a terrific deterrent if this is a union where members are frequently initiated. It appears in one of General Counsel's exhibits that the initiation fee into Local 542 is $200.00 "plus any and all fees or tax required by the

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[10] "If * * * the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any * * * unfair labor practice, then the Board shall * * * issue * * * an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this subchapter* * * *." 29 U.S.C.A. § 160(c) (emphasis added).

The policies of the Act, as stated in § 1, 29 U.S.C.A. §151, are the encouragement of "the practice and procedure of collective bargaining and * * * [the protection of] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Local or the International Union." Imposition of fines or jail sentences upon employers or unions who are guilty of unfair labor practices would also be a deterrent, so far as such sanctions can act as a deterrent. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties. "The Act does not prescribe penalties or fines in vindication of public rights. * * *" *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 10 (1940). "[I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Id.* at 12.[11]

The reimbursement order here was a very broad one. It was not limited to employees who had been coerced. Nor was there any coercion shown against anyone. The order was not limited to the employees at the Morrisville plant of the American Bridge Division where the alleged unfair labor practices occurred. It ran as to all members of Local 542 employed by American Bridge, providing for reimbursement of initiation fees and dues dating back six months before the complaint was filed. The record is devoid of any information as to how many members there are in Local 542, when they joined and how many are employed at the Morrisville or other American Bridge Division plants. This shows, we think, that the reimbursement order was a shotgun blast, and not related

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[11] See also Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

to any aspect of this case. That is not the way equity acts in moulding relief to fit the situation before Court or Board.[12]

We think that the reimbursement order in this case is characterized the way Judge Staley characterized a similar order in *NLRB v. American Dredging Company*,—F. 2d—(3d Cir. Jan. 8, 1960), where he said:

> In the circumstances of this case, we cannot perceive how reimbursing employees who the evidence shows were all union members for initiation fees, dues and other monies paid to the union could in any way effectuate the policies of the Act. This case involves preferment of union members for employment, and thus it is incomprehensible to us how reimbursing them for initiation fees, dues payments, etc., paid to their union can be anything but a windfall to the employees and an unjust penalty to the employer. This was certainly no purpose of the National Labor Relations Act.

The problem of *Brown-Olds* reimbursement has occupied attention of the courts in the various circuits a great deal during the last few months. We recognize the existence of a recent view contrary to that which is expressed here in *NLRB v. Local 60, United Brotherhood of Carpenters*, 273 F. 2d 699 (7th Cir. 1960). But, op-

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[12] "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity." NLRB v. National Biscuit Co., 185 F. 2d 123, 124 (3rd Cir. 1950). See also NLRB v. Globe Automatic Sprinkler Co., 199 F. 2d 64, 70 (3d Cir. 1952).

posed to the Seventh Circuit view, there is a growing body of authority, some of it very forcefully and clearly written, supporting our views. See *NLRB v. Local Union No. 85, Sheet Metal Workers,* 274 F. 2d 344 (5th Cir. 1960); *Local 357, Teamsters v. NLRB,* — F. 2d —, No. 14,794 (D.C. Cir. Feb. 18, 1960); *Morrison-Knudsen Co. v. NLRB* and *International Hod Carriers v. NLRB,* — F. 2d —, Nos. 16,383, 16,401 (9th Cir. Feb. 19, 1960); *Morrison-Knudsen Co. v. NLRB,* — F. 2d —, No. 25,613 (2d Cir. Mar. 2, 1960); *Building Material Teamsters, Local 282 v. NLRB* and *Crawford Clothes v. NLRB,* — F. 2d —, Nos. 25,608, 25,614 (2d Cir. Mar. 2, 1960).

For a summary of the cases in the various Courts of Appeals involving this remedy see appendix attached hereto.

The order of the Board will be enforced but with deletion of the paragraph quoted above relating to the reimbursement order.

APPENDIX

Since the Supreme Court decision in *Virginia Electric, supra,* numerous cases have arisen in the several Courts of Appeals involving the question of the validity of a broad dues-reimbursement order in fact situations other than the type found to be present in that case. The decisions seem to be hopelessly in conflict. A court-by-court analysis indicates the following:

First Circuit—No decisions on point. *Cf. NLRB v. Local 404 Teamsters,* 205 F. 2d 99 (1953), enforcing a remedy providing for dues reimburse-

ment to 31 employees shown to have been specifically coerced.

Second Circuit—The broad remedy is specifically disapproved as applied to employers. *Morrison-Knudsen Co. v. NLRB*, — F. 2d —, No. 25,613 (Mar. 2, 1960). It is also disapproved against unions, although there is an intimation that it might be permissible to order a union to reimburse dues to all the employees upon showing of actual coercion of only some. *NLRB v. Adhesive Products Corp.*, 258 F. 2d 403 (1958); *Building Material Teamsters, Local 282 v. NLRB* and *Crawford Clothes, Inc. v. NLRB*, — F. 2d —, Nos. 25,608, 25,614 (Mar. 2, 1960).

Third Circuit—No decisions on point prior to *American Dredging* and the instant case. *Cf. NLRB v. Local 420, Plumbers*, 239 F. 2d 327 (1956), enforcing an order providing for reimbursement of "permit" fees to certain individuals shown to have been specifically coerced. In *NLRB v. Spiewak*, 179 F. 2d 695 (1950), a *Brown-Olds* order was approved, but the point was not argued by counsel. In this case a company-assisted union was involved together with a closed shop agreement.

Fourth Circuit—No decisions on point. *Cf. Virginia Electric & Power Co., v. NLRB*, 132 F. 2d 390 (1942), *aff'd* 319 U.S. 533 (1943). The Supreme Court opinion in this case is the starting point in the analysis here. See also *NLRB v. Baltimore Transit Co.*, 140 F. 2d 51, *cert. denied* 321 U.S. 795 (1944), enforcing the broad remedy in a *Virginia Electric* type situation.

Fifth Circuit—Dictum in *NLRB v. McGough Bakeries Corp.*, 153 F. 2d 420, 425 (1946), indicated apparent disapproval of the broad reimbursement order. However, in later cases the court sustained the remedy, *NLRB v. Parker Bros.*, 209 F. 2d 278 (1954), *Dixie Bedding Co. v. NLRB*, 268 F. 2d 901 (1959), although it refused to enforce it in a case where there was no closed shop contract and most of the members of the union testified that they had joined voluntarily and had not been coerced, *NLRB v. Braswell Motor Freight Lines*, 209 F. 2d 622, *as modified* 213 F. 2d 208 (1954). However, in *NLRB v. Local No. 85, Sheet Metal Workers*, 274 F. 2d 344 (1960), the court disapproved of the broad dues-reimbursement remedy "in the absence of some proof that dues would not have been paid but for the requirement" of union membership as a condition of employment. *McGough Bakeries, Parker Bros., Dixie Bedding*, and *Braswell Motor* all involved orders directed at the employer only. In *Local No. 85*, the order was directed against the union only.

Sixth Circuit—No decisions on point.

Seventh Circuit—The court refused to enforce the broad dues-reimbursement remedy (directed at the employer only) in a situation where, although there was employer sponsorship and support of the union, there was no closed or union shop and non-union workers were not discriminated against. *NLRB v. Shedd-Brown Mfg. Co.*, 213 F. 2d 163 (1954). However, it upheld a broad dues-reimbursement remedy di-

rected at the union only where there was an illegal closed shop arrangement. *NLRB v. Local 60, Carpenters*, 273 F. 2d 699 (1960). Apparently the Board in the latter case did not argue in terms of a "conclusive presumption" as it does here, for the court talks about the burden of proof being on the union to show that the employees would have remained in the union even without the unlawful discrimination, 273 F. 2d at 703.

Eighth Circuit—No decisions on point. *Cf. Donnelly Garment Co. v. NLRB*, 165 F. 2d 940 (1948), enforcing the broad remedy in a *Virginia Electric* type situation.

Ninth Circuit—The Broad dues-reimbursement remedy is specifically disapproved as against both union and employer. *Morrison-Knudsen Co. v. NLRB* and *International Hod Carriers v. NLRB*, — F. 2d —, Nos. 16,383, 16,401 (Feb. 19, 1960).

Tenth Circuit—The broad dues-reimbursement remedy is specifically approved as against both union and employer. *NLRB v. Broderick Wood Products Co.*, 261 F. 2d 548 (1958); *NLRB v. General Drivers Local No. 886*, 264 F. 2d 21 (1959).

District of Columbia Circuit—In *Local Lodge No. 1424, IAM v. NLRB*, 264 F. 2d 575, *cert. granted* 360 U.S. 916 (1959), the court specifically approved of the broad remedy as against both union and employer. However, in *Local 357, Teamsters v. NLRB*, — F. 2d —, No. 14,794

(Feb. 18, 1960), a different panel, in a per curiam opinion, specifically disapproved of the broad remedy where it was directed against the union only.

The eleven cases decided prior to *Virginia Electric* are listed in a footnote to that opinion. 319 U.S. at 534 n. 1.

BIGGS, *Chief Judge*, concurring in part and dissenting in part.

The facts in this case as developed by the Board and by the majority opinion demonstrate circumstances under which preferential hiring of union employees could be and probably was effected by the Union and the Company. But the record is devoid of evidence which shows that such preferential hiring did take place. The Board and this court have substituted a plausible assumption for proof of preferential hiring. It is not sufficient to prove, as the Board has done here, that a facile arrangement existed whereby the Union and the Company could have effected preferential hiring of the Union's members. For this reason I dissent from that portion of the majority opinion which supports the Board's order respecting the alleged preferential hiring. But had preferential hiring been approved I would concur in the majority view as to the application of the "Brown-Olds" remedy.

I agree with the majority's conclusion as to the relief to be granted to Russell.

A True Copy:

Teste.

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,011

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1960

Before BIGGS, *Chief Judge,* and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

SUPPLEMENTAL OPINION OF THE COURT

(Filed May 17, 1960)

PER CURIAM

The National Labor Relations Board has submitted a form of decree carrying out this Court's decision in the above entitled case in which the opinion was filed on April 13, 1960. Since our opinion was filed the United States Supreme Court has entered its decision in the case of *Communications Workers of America v. NLRB,* — U.S. — (May 2, 1960). In that decision the Supreme Court held that it was proper to eliminate from a decree enforcing a Board order against a union broad terms like "in any manner" and "or any other employer" when the complaint was directed against the union's conduct with respect to one employer and one type of unfair labor practice.

We think the objection of both union and employer to the decree submitted by the Board is well taken in view of this Supreme Court decision. The decree as entered will delete from both the required notice and the order the terms "or any other employer over whom the Board will assert jurisdiction," "or any other labor organization," "or any other employee or applicant for employment," "or by discriminating in any other manner in respect to the hire or tenure of employment, or any term or condition of employment."

The sections of the decree affected by this opinion are as follows: I(a)(1), I(a)(2), I(a)(3), II(a)(1), II(a)(2), and II(a)(3). Also affected are paragraphs (2) and (3) of the Notice required to be posted by the employer and paragraphs (1) and (2) of the Notice required to be posted by the union.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) AND LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Respondents

Decree Enforcing, as Modified, an Order of the National Labor Relations Board

Before: BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated February 9, 1959. The Court heard argument of respective counsel on March 8, 1960, and has considered the briefs and transcript of record filed in this cause. On April 13, 1960, the Court, being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said Order. In conformity therewith, it is hereby

I. Ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that Respondent, United States Steel Corporation (American Bridge Division), its officers, agents, successors, and assigns shall:

(a) Cease and desist from:

(1) Entering into, performing, maintaining, or giving effect to any agreement, arrangement, or understanding with Local Union 542, International Union of

Operating Engineers, AFL-CIO, which conditions the hiring of applicants for employment, or the retention of employees in their jobs, upon clearance or approval by, or upon membership in, such labor organization, except as authorized by Section 8(a)(3) of the Act;

(2) Encouraging membership in Local Union 542, International Union of Operating Engineers, AFL-CIO, by granting preference in hiring to its members, except as permitted by Section 8(a)(3) of the Act.

(3) Discriminating against James Russell by refusing to hire him without approval of the above-named Union, except to the extent permitted by Section 8(a)(3) of the Act;

(4) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(2) Post at its offices and job sites within the territorial jurisdiction of Respondent Local Union 542,

copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Fourth Region, (Philadelphia, Pennsylvania) shall, after having been duly signed by Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees or job applicants are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material;

(3) Post at the same places and under the same conditions as set forth in (2) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Union's Notice herein marked "Appendix B";

(4) Mail to the aforesaid Regional Director signed copies of the notice attached hereto marked "Appendix A" for posting by Respondent Local Union 542, at its offices, hiring halls, and meeting halls in places where notices to members and to other persons using Local Union's 542's hiring hall are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by a representative of the Respondent Company, be forthwith returned to the aforesaid Regional Director for such posting;

(5) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree as to what steps the Respondent Company has taken to comply herewith.

II. It is further ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that Respondent Local Union 542, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Entering into, performing, maintaining, or otherwise giving effect to any agreement, arrangement, or understanding with the Respondent United States Steel Corporation (American Bridge Division), which conditions the hiring of applicants for employment or the retention of employees in their jobs, with such employer upon clearance or approval by the said Respondent Union, or which conditions employment upon membership in the Respondent Union, except as authorized by Section 8(a)(3) of the Act;

(2) Causing or attempting to cause the Respondent Company to discriminate against James Russell, in violation of Section 8(a)(3) of the Act;

(3) In any like or related manner restraining or coercing employees or prospective employees of Respondent Company in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

(b) Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Preserve and make available to the Board or its agents upon request, for examination and copying,

all records, reports, and other documents, necessary to analyze the amounts of moneys due under the terms of this Order;

(2) Notify in writing Respondent Company and James Russell that the Respondent Union has withdrawn its objections to the hiring or continued employment of Russell by Respondent Company, or to his employment by any other employer;

(3) Post in the Respondent Union's business offices, hiring halls, and meeting halls copies of the notice attached hereto as "Appendix B." Copies of said notice, to be furnished by the aforesaid Regional Director shall, after being duly signed by an authorized representative of the Respondent Union, be posted by the said Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days in conspicuous places, including all places where notices to members and to other persons using respondent Union's hiring hall are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced, or covered by any other material;

(4) Post at the same places and under the same conditions as set forth in (3) above, as soon as they are forwarded by the said Regional Director, copies of the Respondent Company's Notice herein marked "Appendix A";

(5) Mail to the aforesaid Regional Director signed copies of the notice attached hereto marked "Appendix B" for posting by Respondent United States Steel Corporation (American Bridge Division), at its offices

and job sites within the territorial jurisdiction of Respondent Union, including all places where notices to employees or job applicants are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being duly signed by a representative of Respondent Union, be forthwith returned to the aforesaid Regional Director for such posting;

(6) Notify the said Regional Director in writing within ten (10) days from the date of this Decree as to what steps the Respondent has taken to comply herewith.

III. The Respondent, United States Steel Corporation (American Bridge Division), its officers, agents, successors, and assigns and the Respondent, Local Union 542, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, and assigns, shall jointly and severally make whole James Russell for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of the Board's Decision entitled "The Remedy."

BY THE COURT:

GOODRICH,
Circuit Judge.

Dated: May 17, 1960

Appendix A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECREE of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT enter into, perform, maintain or otherwise give effect to any agreement, arrangement, or understanding with LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, requiring membership in, or clearance by, said labor organization as a condition of employment, except as authorized by Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT encourage membership in LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, or any other labor organization, by refusing to hire James Russell, or any other applicant for employment, or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized by Section 8(a)(3) of the act.

WE WILL NOT discriminate against James Russell or any other applicant for employment by refusing to hire him without approval of the above-named union, except as permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the

exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act. WE WILL make James Russell whole for any loss of pay suffered as a result of the discrimination against him.

UNITED STATES STEEL CORPORATION
(AMERICAN BRIDGE DIVISION)

.....
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced or covered by any other material.

Appendix B

NOTICE

TO ALL MEMBERS OF LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; TO ALL EMPLOYEES OF UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION); TO ALL EMPLOYEES WHO WORK, OR WISH TO WORK WITHIN THE JURISDICTION OF OPERATING ENGINEERS, AND TO ALL APPLICANTS FOR EMPLOYMENT

PURSUANT TO A DECREE

of the United States Court of Appeals enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT enter into, perform, maintain or otherwise give effect to any agreement, arrangement, understanding, or practice with UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), which conditions the hiring of applicants for employment, or the retention of employment in their jobs, with such employer upon clearance or approval by us, or which conditions employment upon membership in our organization, except as authorized by Section 8(a)(3) of the Act.

WE WILL NOT cause or attempt to cause UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), against James Russell, in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL make James Russell whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL notify, in writing, UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), that we have no objection to the hiring or employment of James Russell.

WE WILL notify, in writing, James Russell, that we have withdrawn our objection to the hiring or continued employment of him by UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION), or to his employment by any other employer.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.....
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date of this posting and must not be altered, defaced or covered by any other material.

ILE COPY

FILED
SEP 8 1960
JAMES R. BROWNING

No. 311.

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES STEEL CORPORATION (AMERICAN BRIDGE DIVISION) and LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

STANDAU E. WEINBRECHT,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

CITATIONS

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v.

NATIONAL LABOR RELATIONS BOARD

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Board has filed a petition for certiorari to review the decision of the Court of Appeals in this case insofar as it denies enforcement of the reimbursement provisions of the remedy prescribed by the Board for the hiring arrangement which it and the Court found to be illegal. *National Labor Relations*

Board v. *United States Steel Corporation (American Bridge Division) and Local 542, International Union of Operating Engineers*, No. 228, this Term. That petition was filed to preserve the Board's position that it possesses authority to prescribe such remedy for an illegal hiring arrangement, pending a resolution of the question by this Court in *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters*, Nos. 68 and 85, this Term, certiorari granted June 27, 1960. The instant conditional cross-petition seeks to have the Board's unfair labor practice findings, sustained by the court below, reviewed should this Court grant the Board's petition on the reimbursement phase of the case, No. 228. We submit that the cross-petition should be denied irrespective of the disposition of the Board's petition in No. 228, for the issues sought to be raised are evidentiary ones, and, since the court below has found that the Board's findings are supported by substantial evidence, there is no occasion for review by this Court.

In the Board's view, the cross-petition presents two questions: (1) whether there is substantial evidence to support the Board's finding that the Union and the Company entered into an arrangement which delegated exclusive hiring authority to the Union and provided that preference in employment would be accorded to union members; and (2) whether substantial evidence supports the Board's finding that employee Russell was denied employment as a result of the operation of this discriminatory hiring system.

The evidence summarized in the Board's petition in No. 228, pp. 4-6, and that detailed in the opinion of the Court of Appeals (Cross-pet. 23-25) furnish adequate support for the Board's unfair labor practice findings.[1]

The record shows that the Master Mechanic, who was selected by the Union, exercised complete control over the selection of operating engineers to be employed; he secured employees exclusively from the hiring hall maintained by Local 542; he was required by the Union rules to hire only those in good standing in the Union; and it does not appear that any non-union men were employed at the Morrisville plant. On these facts, the Board could conclude that there existed a hiring arrangement which limited employment to union members in good standing with the Union.[2] Similarly, in the light of Russell's long dispute with officials of the Local over the manner in which they conducted union affairs, it was within the Board's competence to conclude that his denial of employment, for work for which he was qualified, was attributable to his falling out of grace with the Union.

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[1] It may be noted that the Court of Appeals sat *en banc*, and all of its members except Chief Judge Biggs, who dissented on the hiring arrangement but not as to Russell (Cross-pet. 36), so concluded.

[2] The cases cited by petitioners (Cross-pet. 12-13) do not conflict in principle with the decision here, but are distinguishable on their facts.

For these reasons, the conditional cross-petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

STANDAU E. WEINBRECHT,
Attorney,
National Labor Relations Board.

September, 1960.

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